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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Appellant, v. TCHALLA JAMAL CORUM, Defendant and Appellant.	C059249 (Super. Ct. No. CM025721)

Based on evidence that defendant Tchalla Jamal Corum assaulted his former girlfriend (S.) and his four-year-old son (D.) on September 3, 2006, the jury convicted him of six criminal counts. (Pen. Code, §§ 261, subd. (a)(2) [count 1, forcible rape], 236 [count 2, false imprisonment], 273.5, subd. (a) [count 3, domestic violence], 273a, subd. (b) [count 4, child cruelty], 273.6, subd. (a) [count 5, violating a court order], 422 [count 6, criminal threats].) Based on evidence that in 2002 he gave a drunk girl (K.B.) Ecstasy and then sexually assaulted her, the jury convicted him of sodomy of an intoxicated person. (*Id.*, § 286, subd. (i) [count 7].) The

trial court found allegations that defendant had a prior domestic abuse conviction and had served a prior prison term to be true. (*Id.*, §§ 273.5, subd. (e), 667.5, subd. (b).)

The trial court granted a new trial as to the sodomy charge because of a purported instructional error, and the People timely appealed. The trial court sentenced defendant to prison for 11 years for the other counts, and defendant timely appealed.

In defendant's appeal, we reject his claim that the trial court abused its discretion by admitting evidence of defendant's prior assaults against the victim. In the People's appeal, we conclude no instructional error occurred, and in any event any error was harmless. Accordingly, we remand with directions to deny the new trial motion and resentence defendant.

FACTS AND PROCEEDINGS

S., aged 20 at the time of trial, testified defendant was the father of her four-year-old son, D. Defendant is three years older than S. At some point S. obtained a restraining order against him, and was granted full custody of D. The parties stipulated defendant was served with the order on January 5, 2005.

In April 2005, defendant became upset at S. after she met him at his mother's house, and he followed her down the street, trying to take D. away from her. He grabbed the back of S.'s hair and tried to pull her down, almost causing her to drop D. He told her that if she called the police, he would kill her, which scared her. She sought refuge at a Safeway market, where

a manager allowed her to use the phone. She saw a doctor and was diagnosed with whiplash because of this incident.

Around August 2006, when S. was at Kim F.'s house, defendant arrived, so S. went into a bedroom to avoid him. When he came in the room and she told him "don't think we are going to do anything," he called her a bitch and hit her on the mouth, causing her to bleed, and put a pillow over her face so she could not scream. Her lip was swollen and blue, but she did not report the incident because, "He just always told me if I ever called the police on him, that he would take my son, and he would kill me."

On September 2, 2006, S. agreed to allow defendant to see D. She had conflicting feelings about defendant, because she wanted her son to have a relationship with his father and still hoped to reconcile with defendant to "do the family thing." Defendant left to see some friends and returned after midnight. By then, Ariana D. was at the apartment. For about 15 minutes, the three of them watched a movie, with Ariana on one couch and S. and defendant on another. Then defendant went to S.'s bedroom. S. watched the movie with Ariana for about an hour, ending around 2:00 a.m. on September 3, 2006. S. then slept alongside defendant, but they did not initially engage in sexual intercourse.

After waking up when it was light later that morning, S. had consensual intercourse with defendant. He used a condom, as was their practice. After S. made D. breakfast, she returned to the bedroom and told defendant he had to leave because she was

baby-sitting for her brother and her family did not want him to be there.

This upset defendant. He spoke of taking D., and he called S. names. She wanted to ignore defendant and left the room. When she and Ariana were in the living room, talking and laughing about the movie they had seen, defendant got angrier and called them "stupid bitches and stuff like that," so S. went to try to calm him down. Defendant locked the bedroom door, which scared her. He grabbed her hair and pulled her onto the bed, covered her mouth "and told me that if I made any noise, then he's going to punch me in my mouth. And so I was really scared, and I just tried to be quiet so my son didn't hear."

Defendant then put a belt around S.'s neck and said he would choke her, and that she would "suck his dick, or he was going to have sex with me without a condom to get me pregnant so nobody else would want me." When S. declined to do either, defendant "just told me to shut the fuck up, and he forced himself onto me." She tried to fight him off, but he forcibly raped her.

After that, in the living room, defendant told D. that "If you ever, ever in your mother fucking life tell anybody that I put a hand on your mom, then I am going to beat your mother fucking ass." When S. told him not to speak to D. like that, "he hit my son in the face. And then I went to go get up, and he hit me." This left D.'s face red and swollen.

Eventually, S.'s mother called, became suspicious of S.'s answers, and called the police.

S. remembered telling an officer she had consensual sex with defendant, but did not tell the officer *when* she had done so. When the police first arrived, S. told them she and defendant had been having a custody dispute and he hit her and D.; she did not mention the rape until she made a written statement.

Ariana testified that when she woke up that morning, she watched television with D. S., who had been crying, whispered to call the police, but when defendant came, S. shook her head and whispered not to do it. Ariana saw defendant choke S., slap D. hard in the face, then slap S. When Ariana tried to intervene, defendant said, "You better sit down or I am going to slap you and her."

Colleen Doran, a sexual assault nurse, spoke with S. on September 3, 2006. S. reported that she had had consensual sex the night before, and had been raped that morning. She reported several areas of tenderness, including in her vagina. S. said defendant choked her with a belt, slapped her, and forcibly entered her, so roughly that "it hurt inside."

Doran examined S., and found her neck was tender and bruised. Her back, forearms and wrists were tender, and she had a bruise inside her left knee, all of which was consistent with her description of being held down and raped. Her vagina was abraded and tender, and had a small tear, and her cervix showed "vascularity there like in pinching or bruising" which "can be caused by excessive force in penetration."

Chico Police Officer William Clark testified S. reported defendant hit D. and slapped her, and when the officer saw that both had corroborating redness, and Ariana corroborated the report, defendant was arrested. Officer Clark asked S. to fill out a written statement, and told her to be thorough and specific. In part she wrote that defendant forced her to have sex with him and choked her with a belt. Officer Clark then retrieved the belt from the bedroom. He clarified with S. that she had had consensual sex with defendant the night before he raped her.

S. testified that in school she had a best friend, K.B., who was a year younger, but in the same class. When S. was 15 or 16, she was with K.B. at a party in Chico. K.B. got drunk, but as they walked back to S.'s relative's house, K.B. seemed to feel better. S. went into a room to sleep, leaving K.B. and defendant on a couch, watching a movie. When S. went to the kitchen, she saw them under a blanket, with defendant on top, kissing K.B. "And when they saw me, they both jumped up, and I was just really mad." Defendant "got mad at me and started calling me a bitch and stuff."

However, S. later received a letter from defendant, which convinced her that K.B. was innocent. The letter urged S. not to end her friendship with K.B. With typographical corrections, defendant's letter reads in part:

"Look I don't know if you remember that night but that night [K.B.] was not in her right mind. She was completely drunk as fuck, even throwing up. So I gave her some water &

slipped her [an Ecstasy] pill. I told her it was something to [soothe] her stomach so she could sober up. But instead it was [an Ecstasy] pill to get her more fucked up. So by the time I went back into the [living] room the pill kicked in & she was out of her body. She did not have a clue about what was going on. I don't even think she knew her name at that time, but I took a full advantage of her & made it look like it was both of our idea when it was really mine. She was too drunk & [affected by] the pill to say anything. [Whether] you believe me or not I know if she was sober & in her right state of mind none of that would [have] happened."

K.B. testified that when she was 14 or 15, in 2002, she went to a party in Chico with S. She weighed 90 to 95 pounds and was not an experienced drinker, and got drunk to the point of nausea. She and S. walked to defendant's cousin's house, and then took a taxi to S.'s relative's house. K.B. was still sick, and defendant offered her something to feel better; she thought it would be a marijuana pill. She fell asleep, then woke to find defendant kissing her. She felt physically helpless to do anything, but after a while, she was able to say "No." By then, defendant had taken their pants down and was on top of her. When K.B. tried to close her legs, he opened them again. Defendant sodomized her, which was painful. She remembered telling him "Don't" and "Stop, please."

When S. appeared, defendant "got all of the way close to my face, said, 'Don't move.'" S. said she could not believe what was happening and asked what they were doing, but K.B. did not

say anything. Defendant ran into a room with S. and locked the door, and K.B. could hear them arguing. K.B. "was still laying there until I woke up the next morning and found my panties and my pants, and all tangled up in the blanket." K.B. did not say anything because she did not want S. to be mad at her, and when she returned to school, one of defendant's cousins told her "to be quite . . . or else." This frightened K.B., and within weeks she moved away and changed schools. For a few days after the incident K.B. bled from her anus, but she did not seek medical attention.

K.B. did not recall telling an investigator that defendant penetrated her vagina. When shown a transcript of her interview, she explained "I didn't mean it that way. What I meant by it was he didn't put it in my vagina. It was not there. It was in my anus, not my vagina.

After the People rested, the court granted a motion to acquit on what had been count 7, rape of an intoxicated person (K.B.), and renumbered count 8, sodomy of an intoxicated person (K.B.), as count 7.

The defense moved to acquit as to the sodomy count, because defendant was in custody in December *2003*, the date alleged in the information. In response, the People renewed a prior motion to amend the information to change the date of the sodomy count to December *2002*. The motion to amend the information was granted.

The defense called Pamela Chambers, a victim counselor, to try to show that S. had made inconsistent statements,

specifically, about how many times defendant had hit S. at Kim F.'s house, without apparent success. There was no other defense evidence.

The defense theory as to the sodomy count was that, because K.B. *tried* to resist, she had not been "prevented" from resisting, as the jury was instructed it had to find. As for the other counts, defense counsel argued that "hell hath no fury like a woman scorned," and S., angry that defendant had abandoned her, and still angry about his sex with K.B., set defendant up, by repeatedly inviting him over despite the restraining order, engaging in consensual sex with him, and then accusing him of various crimes.

The jury convicted defendant on counts 1 through 7. The trial court found he had a prior domestic abuse conviction and had served a prior prison term.

After granting a new trial on the sodomy count, count 7, the trial court sentenced defendant to prison for 11 years. Retrial on count 7 was stayed pending this appeal. Both the People and defendant timely filed their notices of appeal.

DISCUSSION

I

Defendant's Appeal: Evidence of Uncharged Acts

Defendant contends the trial court improperly admitted into evidence S.'s testimony about two prior uncharged incidents of domestic abuse. We disagree with this contention.

Before trial, the People moved to introduce seven prior incidents of violence committed by defendant against S. At the

hearing, the prosecutor stated it would not be seeking a "mini trial" on the other acts, that instead they would be proven through S.'s testimony.

The trial court admitted three incidents, "the August 2006 visits, the July 2006 episode at Kim F.'s, and the April 29th, 2005 episode out in the street in the area of the Safeway. The remaining items or evidence proffered are excluded under 352." However, at trial, no evidence was presented about any "August 2006 visits." S. testified about the incidents at Kim F.'s house and near the Safeway market. Her direct testimony about those two uncharged incidents occupies less than four pages of transcript. The trial court gave the jury a pattern instruction (CALCRIM No. 852) that allowed the jury to infer from this evidence that defendant "was disposed or inclined to commit domestic violence" and to use this evidence, with other evidence, to conclude that "defendant was likely to commit and did commit infliction of injury to a coparent, as charged here."

On appeal, defendant contends the trial court abused its discretion by admitting evidence of the two uncharged incidents, "based on the probability that they confused the jury, added nothing of significant probative value to assist the jury in its assessment of the evidence, and were more inflammatory in some respects." We disagree.

Evidence Code section 1109 allows the introduction into evidence of prior domestic violence to show that a person has the propensity to engage in such conduct, and defendant does not

challenge the general validity of the statute in this case. (See *People v. Johnson* (2000) 77 Cal.App.4th 410, 419-420.)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "pre-judging" a person or cause on the basis of extraneous factors.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) Evidence Code section 352 gives the trial court discretion to weigh possible prejudice against the probative value of evidence. "The admissibility of evidence of domestic violence is subject to the sound discretion of the trial court, which will not be disturbed on appeal absent a showing of an abuse of discretion." (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.)

Defendant contends the uncharged act evidence would likely confuse the jury because some of the testimony about the incident at Kim F.'s house was similar to the testimony about the charged offenses, and because S. first testified about the uncharged acts before testifying about the charged offenses. We disagree. S.'s testimony about the three incidents of abuse was

given in chronological order, and there is no basis to infer the jury could not understand it. Further, her direct testimony about both uncharged incidents again took less than four pages of the reporter's transcript. There is no basis to conclude her testimony was confusing.

Defendant also asserts it is hard to tell which incident S. described during an excerpt of the recording of her statement to the victim counselor. But S. was available to testify and clarify which incident she was describing on the recording, and there is no reason to conclude this recording would tend to confuse the jury. Nor does it appear that this alleged risk of confusion was mentioned when the trial court was considering the People's in limine motion.

Defendant claims the April 2005 incident was inflammatory because defendant accosted S. on the street, pulled her hair, giving her a whiplash, and tried to grab D. But in the current incident, he *raped* her and hit D. However bad the uncharged incident was, it was not inflammatory as compared to the charged incident. (Cf. *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738 [past offense "inflammatory *in the extreme*" in comparison to current offenses].)

The evidence was probative. As the prosecutor argued, in part it helped to show that when defendant threatened S. with violence, it was reasonable for her to believe him.

Defendant contends S. lacked credibility; therefore, the uncharged act evidence would unfairly bolster her testimony. We disagree. S.'s testimony was corroborated by Ariana, who

witnessed part of defendant's attack, and by the medical evidence, which supported S.'s claim she had been forcibly raped. The People's case was quite strong without the uncharged act evidence; that evidence did not unfairly bolster what was otherwise a weak case.

We conclude the trial court acted within its discretion in admitting this evidence under Evidence Code section 1109.

We note that the evidence may also have been admissible on another ground: "Even before the enactment of section 1109, the case law held that an uncharged act of domestic violence committed by the same perpetrator against the same victim is admissible: 'Where a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a 'distinctive modus operandi' analysis of other factors.'" (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1026.)

Finally, as we have earlier observed, the evidence of the current offenses against S. and D. was strong. The prejudice flowing from a misapplication of Evidence Code section 352 is evaluated under the state-law standard. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.) It is not reasonably probable that, absent the uncharged act evidence, defendant would have obtained a better result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

The People's Appeal: Instructional Error

After the verdicts, defendant moved for a new trial, alleging that the verdict on sodomy was contrary to the evidence, and the trial court improperly allowed the People to amend the information to change the date of the alleged sodomy. The trial court denied the motion on those two grounds, but after soliciting further briefing, granted the motion on a third ground the court had raised, that the court misinstructed the jury.

Defendant mentions the purportedly late amendment to the information, in order to refute a claim by the Attorney General regarding defendant's trial strategy. But defendant does not head or argue prophylactic claims about the two grounds stated in his new trial motion. Accordingly, he has forfeited them. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 929 ["A point not argued or supported by citation to authority is forfeited"]; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

In any event, the court concluded that substantial evidence supported the theory that defendant may have reasonably, but mistakenly, believed K.B. was capable of consenting to sodomy, and because the trial court had not given a bracketed part of a pattern instruction (CALCRIM No. 1032) addressed to that theory, defendant was prejudiced.

We disagree with the trial court's conclusion for two reasons. First, whether substantial evidence supports an instruction is a legal question subject to independent review.

(See *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78 (*Oropeza*); *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054-1055.) We shall conclude no substantial evidence supported the theory that defendant reasonably but mistakenly thought K.B. was capable of consenting to sodomy, therefore no instructional error occurred.

Second, although we review a trial court's conclusion that an instructional error caused prejudice under the abuse of discretion standard (*People v. Gibson* (1965) 235 Cal.App.2d 667, 669; *People v. McCord* (1936) 15 Cal.App.2d 136, 140; see *People v. Ault* (2004) 33 Cal.4th 1250, 1263), as a matter of law, an instructional omission is not prejudicial where "'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 164-165; see *People v. Wharton* (1991) 53 Cal.3d 522, 572; *People v. Carrillo* (2008) 163 Cal.App.4th 1028, 1038 (*Carrillo*).) In this case, as we shall explain, the omitted instruction was covered by other instructions, and therefore defendant was not prejudiced by its omission. By concluding otherwise, the trial court departed from legal principles and therefore abused its discretion in granting a new trial. (See *People v. Knoller* (2007) 41 Cal.4th 139, 156 (*Knoller*).)

Penal Code section 286, subdivision (i) provides: "Any person who commits an act of sodomy, where the victim is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused,

shall be punished by imprisonment in the state prison for three, six, or eight years."

The trial court instructed on sodomy of an intoxicated person using a pattern instruction, CALCRIM No. 1032, in relevant part as follows:

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant committed an act of sodomy with another person;

"2. The effect of an intoxicating substance prevented the other person from resisting;

"AND

"3. The defendant knew or reasonably should have known that the effect of that substance prevented the other person from resisting.

"*Sodomy* is any penetration, no matter how slight, of the anus of one person by the penis of another person. Ejaculation is not required.

"A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved."

A bracketed portion of CALCRIM No. 1032 that was *not* given reads as follows: "The defendant is not guilty of this crime if [he] actually and reasonably believed that the other person was capable of consenting to the act, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person was capable of consenting. If the People have not met this burden, you must find the defendant not guilty." (CALCRIM No. 1032.)

The defense of reasonable belief in a mistaken fact about sex is most commonly found in cases of forcible rape, where a mistake about consent is known as the *Mayberry* defense. (See *People v. Mayberry* (1975) 15 Cal.3d 143.) This defense has both subjective and objective components. To prevail on a *Mayberry* defense, a defendant must subjectively--that is, *actually*--believe the victim consented, by showing "'evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent,'" and, objectively, "'that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction.'" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148, quoting *People v. Williams* (1992) 4 Cal.4th 354, 360-361 (*Dominguez*).) A *Mayberry* instruction is warranted if and only if there is evidence from which the jury could find a reasonable doubt based on mistaken consent, whether or not the defendant testifies. (*People v. Maury* (2003) 30 Cal.4th 342, 425; *People v. Simmons*

(1989) 213 Cal.App.3d 573, 579-580; *People v. Anderson* (1983) 144 Cal.App.3d 55, 59-62; see *People v. Romero* (1985) 171 Cal.App.3d 1149, 1156 [*Mayberry* defense must have "some evidence that the victim acted in a manner that reasonably could be misunderstood"].)

The defense here is an offshoot of the *Mayberry* defense. It required defendant to have an actual *and reasonable* belief that K.B. was "not too intoxicated to give legal consent" to sodomy. (*People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [discussing the analogous crime of rape of an intoxicated person, Pen. Code, § 261, subd. (a)(3)].) Accordingly, we must determine whether there was "evidence which is sufficient to deserve consideration by the jury and from which a jury composed of reasonable persons could conclude" (*Oropeza*, *supra*, 151 Cal.App.4th at p. 78) that defendant actually and reasonably believed K.B. was not too intoxicated to consent to sodomy.

Viewed in defendant's favor, the evidence about sodomy was as follows: S. testified that when K.B. and defendant saw her, "they both jumped up," from the couch. K.B. testified she was 14 or 15 years old, weighed 90 to 95 pounds, and was drunk to the point of nausea when defendant gave her a pill to make her feel better, after which K.B. went to sleep. She woke up to find defendant kissing and touching her, but her body would not do what her brain told it to do. She closed her legs but he pushed them back and sodomized her.

Parenthetically, we disregard defendant's claims about his state of mind in his letter to S., and any implication that K.B.

said "no" *before* defendant sodomized K.B., because the jury could have rejected that evidence. But there was no rational basis for the jury to reject the rest of her testimony. Defendant concedes on appeal the relevant evidence shows K.B. "had been drinking, that [defendant] gave her a pill that he said would take away the effects of the alcohol, and that she fell asleep."

Defendant contends: "From this evidence, a trier of fact could deduce that although he had given [K.B.] a drug, [defendant] saw that she was awake when he began the sodomy and did not know she could not move her body away." We disagree.

No reasonable juror could have concluded that defendant *reasonably* believed that K.B. was capable of consenting to the act of sodomy, that is, that she was "able to understand and weigh the physical nature of the act, its moral character and probable consequences" and consented to sodomy "freely and voluntarily." (CALCRIM No. 1032.) Such belief could not have been "'formed under circumstances society will tolerate as reasonable.'" (*Dominguez*, *supra*, 39 Cal.4th at p. 1148.) Where a male 18 or 19 years old offers a highly intoxicated 14 or 15 year-old girl drugs, sees her fall asleep, and commits an act of sodomy when she has just awakened, it is manifestly unreasonable for the male to think the victim was capable of consenting to her sodomization. Accordingly, the trial court erred in concluding that substantial evidence supported the defense theory.

Moreover, the trial court's assessment of prejudice was incorrect. The instructions given required the jury to resolve the issue of reasonable belief adversely to defendant.

To convict defendant under the instructions given, CALCRIM No. 1032 and CALCRIM No. 103, the standard reasonable doubt instruction, the jury had to find *beyond a reasonable doubt* that "defendant knew or reasonably should have known" that the effect of an intoxicant "prevented [K.B.] from resisting," that is, she was "so intoxicated" that "she cannot give legal consent." The jury could not have made such a finding and *also* have had a reasonable doubt about whether defendant "actually and reasonably believed" that K.B. "was capable of consenting" as provided by the omitted portion of CALCRIM No. 1032. Because the two beliefs cannot coexist, the guilty verdict on the sodomy count necessarily resolved the issue of defendant's purported reasonable belief adversely to him.

In such circumstances, any instructional error was *necessarily* harmless. (See *Carrillo*, *supra*, 163 Cal.App.4th at p. 1038.) Therefore, the trial court abused its discretion by concluding any such error caused prejudice. (See *Knoller*, *supra*, 41 Cal.4th at p. 156.)

DISPOSITION

The convictions in counts 1 through 6 are affirmed. The order granting a new trial on count 7 is reversed and the cause is remanded with directions to the trial court to deny the motion for a new trial and resentence defendant.

HULL, J.

We concur:

BLEASE, Acting P. J.

SIMS, J.